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No. 84-1117

# In the Supreme Court of the United States

**OCTOBER TERM, 1984**

WINSLOW MANUFACTURING, INC.
and WATSCO, INC.,
*Defendants-Petitioners,*

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
*Plaintiff-Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

Respondent's brief poignantly demonstrates the need for this Court to either review and reverse the decision below or to amend Rule 50(b).

By his silence, respondent admits, as he must, that the plain, unvarnished language of Rule 50(b) clearly provides that, upon the filing of a motion for J.N.O.V., a trial judge is vested with the discretionary authority to either grant that motion or to order a new trial. However, respondent contends, in effect, that a 1957 decision of the Circuit Court of Appeals for the District of Columbia[1] al-

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1. *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C Cir. 1957).

tered the Rule so that, notwithstanding its literal meaning, it now authorizes a trial court to award the less drastic relief, i.e., a new trial, if and only if, the trial judge first specifically states in the record that J.N.O.V. would have been warranted.

For obvious reasons, respondent does not discuss whether that revision grafted upon Rule 50(b) requires that J.N.O.V. must actually be warranted by the record, or if it is merely sufficient for the trial court to so conclude, however erroneously. The latter position was adopted by the court below while the former seems to be the view of the circuit court that initiated the alteration of Rule 50(b). Nor does respondent discuss the consequences if, after granting a new trial in the latter fashion, it is subsequently determined on appeal that J.N.O.V. was not warranted, even though the trial judge expressly stated otherwise.

More importantly, respondent also ignores the confusion and injustice resulting from the decisional departure from the plain words of Rule 50(b) that are bound to continue so long as the Rule dictates a course of action that leads to a procedural nightmare utterly inconsistent with the stated spirit and purpose of the Federal Rules expressly requiring a construction thereof that secures the just determination of every action.

Respondent's brief reveals that he, the trial judge and these petitioners all assumed that Rule 50(b) means what it says. Surely, respondent believed throughout all of the proceedings in the trial court (including the second trial and the post-trial motions following it) that the district court had the power to grant a new trial upon petitioners' motion for J.N.O.V. Otherwise, counsel for respondent would have been honor bound to challenge the trial court's

authority to do so instead of discovering and raising the issue for the first time on appeal. The trial judge undeniably relied upon the plain language of Rule 50(b), as did petitioners and respondent. But, the litigants and the trial judge all were mistaken in their reliance upon the Rule as written, according to the decision below. In all probability, that mistake will be repeated on every subsequent occasion that a party believes that J.N.O.V. is his most appropriate relief, since there is nothing in the Rule itself to alert him, or his opponent, or the trial court that the lesser relief of a new trial grant is not available if the judge simply concludes that it would be more appropriate than the entry of final judgment.

In remarkable defiance of logic, respondent argues that *he* was prejudiced by the trial court's order granting a new trial. Respondent did not think so at the time. To the contrary, respondent did not challenge the trial court's authority to grant such relief until *after* he lost the second trial.[2] Instead, he elected to take advantage of the new trial to attempt to effectuate a separate recovery from petitioners that could have been much larger than that obtained in the first trial.[3]

Respondent also argues that he was prejudiced because he was not given notice of the possibility that a new trial might be ordered as to petitioners. Nevertheless, respondent briefed and argued the merits of the post-trial mo-

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2. Respondent admittedly raised this issue for the first time as "an additional question" in his brief in the Court of Appeals.

3. The trial court relieved respondent of the burden of proving actual damages in the second trial, thereby limiting the jury's function to determining whether petitioners had "knowingly assisted" Peel's in acts of unfair competition and, if so, whether punitive damages should be assessed. Of particular advantage to respondent was the opportunity to recover a punitive damage award greater than that assessed by the first jury.

tions, including the grounds for a new trial, without ever hinting that the power to grant a new trial as to all defendants was in any way doubtful. Once such relief was granted as to petitioners, respondent still did not challenge the trial court's authority to grant them a new trial. Only after he lost that trial and began briefing the case on appeal did respondent finally challenge the power of the trial court to order a new trial in lieu of J.N.O.V.

Respondent's argument that he would have tried harder to find evidence of liability in the record if he had known the trial court was going to "weigh the evidence" rings an especially hollow note. This is because the trial court, as is recited in its opinion, could not find *any* evidence to support the jury's verdict on the issue of whether petitioners had "knowingly assisted" Peel's. See p. A12 of the Appendix to Petition. Obviously, the record evidence cited by respondent was not sufficient to withstand a motion for judgment notwithstanding the verdict, but Judge Theis' decision to grant a new trial gave him another opportunity to prove his case against petitioners. He failed to do so a second time.

The fact that Judge Theis may have given a reason for granting the new trial (i.e., that some of the evidence was controverted) which may have been inconsistent with his earlier observations that there was no evidence to support the verdict against petitioners was simply one approach to the issue before him. If he had known that he had to "jump through the *Jackson* hoop"—first find that J.N.O.V. was warranted and then grant a new trial anyway—he would have done so, since all the necessary factual predicates for such a course of action were already present in his written opinion.[4]

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4. Both Judge Theis' subsequent opinion and the verdict of the second jury demonstrate that petitioners' assessment of the evidence was correct.

Respondent also argues that petitioners have only themselves to blame because they did not request a new trial in the first instance. This argument misses the point entirely. Petitioners did not seek a new trial because there was no evidence to support the verdict against them. When a litigant finds itself in such a position, it obviously has the right to rest on the record and not give its adversary the opportunity to "mend its hole" by offering new or different evidence at a second trial.[5]

Such a tactical decision by a litigant should not mean that a trial court is powerless to grant a new trial if it believes that the ends of justice are better served in such a manner. Indeed, this is what the drafters of Rule 50 believed when they wrote the language in question and is what Rule 50 itself clearly provides.[6]

The injustice from which petitioners seek the protection of this Court is not that they were deprived of a new trial—something they did not need or want—but that they relied upon the plain language of Rule 50 when they acquiesced in the trial court's decision ordering a new trial, thereby depriving them of the opportunity to appeal from the decision overruling their motion for J.N.O.V.[7]

As interpreted by the court below, Rule 50(b) has become a trap for the unwary. As matters now stand,

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5. The Court of Appeals did not address the issue of whether judgment notwithstanding the verdict would have been "warranted" after the first trial, nor did it remand the case for such a determination.

6. If the trial court does not grant such lesser relief, the verdict winner may itself seek a new trial pursuant to Rule 50(c)(2).

7. The need to file such an appeal became moot when petitioners won the second trial. By the time respondent challenged the trial court's authority to order a new trial, petitioners had lost the opportunity to file a cross-appeal.

litigators and trial courts will continue to rely upon the plain meaning of the Rule whenever relief is sought thereunder. There is nothing within the confines of the Rule itself which will alert those who hereafter apply it to the necessity of consulting case law or treatises to determine what it has been held to require—as opposed to what the language itself clearly states: ". . . the court . . . may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

## CONCLUSION

For the foregoing reasons, this Court should review and correct the grotesqué miscarriage of justice resulting from the decision below.

Respectfully submitted,

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